A

MOHAMED ISMAIL MOHAMED SHARIFF

v.

ZAIN AZAHARI ZAINAL ABIDIN & ORS

B

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
KN SEGARA JCA
RAMLY ALI JCA
[CIVIL APPEAL NO: W-02-57-2005]

C

6 NOVEMBER 2009

PARTNERSHIP: *Dissolution - Position of partner upon retirement covered in auditor's report - Recommendation in report accepted by plaintiff - Whether plaintiff estopped from denying he was bound by report - Whether plaintiff's right to post dissolution profits or interest excluded by recommendations in auditor's report - Whether plaintiff can rely on s. 44 Partnership Act 1961*

D

PARTNERSHIP: *Liabilities of partner - Debt - Sum due from plaintiff to firm upon his retirement - Dispute on value of plaintiff's entitlement at retirement - "Surplus-profit" method of computation used to value firm - Whether "surplus-profit" method best method for valuing legal practice - Whether goodwill refers to value of entire firm - Whether all assets of firm taken into consideration in computation - Whether only plaintiff and 1st defendant entitled to assets of the firm*

E

F

PARTNERSHIP: *Retirement - Effect - Agreed that retirement shall not have effect of dissolving partnership - Partners entire share in firm to be dealt with upon retirement - Whether plaintiff's 5% absolute share to be dealt in accordance with agreement with respect to retirement in auditor's report - Partnership had negative goodwill at time of plaintiff's retirement - Plaintiff's absolute share worthless - Whether absolute share to be determined by reference to firm's goodwill at time of retirement*

G

The appellant ('the plaintiff') and the three respondents ('the defendants') were partners of Messrs Zain & Co ('the firm') from 1 January 1980 until the plaintiff's retirement on 31 December 1988. The firm's auditors between 1983 and 1985 were M/s Azman Wong Salleh & Co ('AWS'). They valued the firm as at 1 January 1980 at RM1,500,000 and their report is dated 18 November 1985 ('AWS Report') using the "surplus-profit" method for valuation

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I

which was an accepted method of valuation of a professional practice. The firm's valuation at RM1,500,000 was accepted by the plaintiff and the defendants. Prior to the admission of the 2nd and 3rd defendants as partners, the plaintiff and the 1st defendant held 40% and 60% equity of the firm respectively. Upon admission of the 2nd and 3rd defendants as partners of the firm on 1 January 1980, the plaintiff and the 1st defendant divested 6.5% and 16.5% of their shares, respectively. Thus, 23% equity of the firm was divested on 1 January 1980 to the new partners – 12% to the 2nd defendant and 11% to the 3rd defendant. The plaintiff and the 1st defendant were entitled to RM97,500 and RM247,500 respectively being the value of 6.5% and 16.5% of the firm which they divested to the 2nd and 3rd defendant as at 1 January 1980. In 1985, the firm appointed Arthur Anderson ('AA') as its new auditors to review the firm's partnership structure and they produced a report dated 3 October 1986 ('AA Report'). On 22 November 1986, the partners of the firm at that time met and discussed the AA Report. The partners accepted the AA report subject to the reservation that, in the event of the value of the share of any retiring partner at the time of retirement was lower than its value at the time of acquisition, the deficit need not be paid by the retiring partner, provided his retirement was after two years of his admission to the partnership. The firm forwarded the plaintiff a copy of the audited accounts of the firm as at 31 December 1988 upon his retirement. The firm in its cover letter informed the plaintiff that the outstanding amount due from him was RM320,096 and asked how he proposed to settle this sum which according to the AA Report was to be settled within one year of his retirement. The plaintiff did not dispute owing RM320,096 and that it was payable within one year of his retirement, but stated that he believed the value of his share in the firm at the time of his retirement would be in excess of the amount due in his current account. By a document dated 20 September 1990 AA made a determination that a net amount of RM215,521 was due from the plaintiff to the firm. Based on AA's computation, the goodwill payable to the plaintiff on his retirement was RM157,302. The plaintiff was aggrieved about the value of his entitlement on retirement and commenced proceedings against the defendants in the High Court. The learned High Court judge after a full trial dismissed the plaintiff's claim for (i) a declaration that assets of the firm belonged to the plaintiff and 1st defendant only and as such the 2nd and 3rd defendants were liable for the use of

A assets of the firm; (ii) payment of other assets; (iii) RM69,309 for initial goodwill which was debited in the plaintiff's account; (iv) balance of payment of goodwill in the sum of RM346,799 and allowed the plaintiff's claim for payment of absolute share at 5% for a period of one year from the date of his retirement in line with the B agreement between the parties that whatever owed by the firm to the plaintiff must be paid within one year from his retirement and likewise whatever the plaintiff owes to the firm must also be settled within one year from his retirement. The plaintiff, dissatisfied with the findings, appealed to this court and the crux of the dispute was C the value of the plaintiff's entitlement when he retired from the firm on 31 December 1988. The defendants cross-appealed against the trial judge allowing the amount claimed by the plaintiff for his 5% "absolute share."

D **Held (dismissing the plaintiff's appeal and allowing the defendants' cross-appeal)**
Per KN Segara JCA delivering the judgment of the court:

(1) The court was unanimous that the surplus-profit method of computation was the best method in valuing a business in the E nature of a legal practice. In this method of computation, goodwill was not treated as a specific asset in the balance sheet of the firm. Goodwill referred to the value of the entire firm and all assets of the firm were taken into consideration in the "surplus-profit" method calculation of goodwill. (paras 16 & 17) F

(2) The court was unanimous that the plaintiff's claim for balance of payment of goodwill amounting to RM346,799 was devoid of any merit. Based on the "surplus-profit" method, the partnership had a negative goodwill of RM1,135,057. An G amount of RM157,302 was due from the firm to the plaintiff in respect of the net amount of goodwill purchased and sold by the plaintiff. RM372,823 was due from the plaintiff to the firm in respect of his current account. Therefore, on his retirement the plaintiff was indebted to the firm in the sum of RM215,521. H This was a pure finding of fact and arithmetic. (para 18)

(3) The learned trial judge rightly rejected the plaintiff's claim that the assets of the firm belonged to the plaintiff and 1st defendant exclusively. There was more than sufficient evidence I before the trial judge to arrive at such a finding, and it did not

warrant any appellate interference. From the circumstances of this case, it was indisputable that the assets of the firm belonged to all the partners of the firm. Therefore, the plaintiff's claim in respect of the alleged continued use by the defendants of the plaintiff's value of the goodwill of the firm and the plaintiff's value of the assets of the firm was without any merits. (paras 19-22)

(4) The entire position of a partner on his retirement was covered by the AA Report. The plaintiff himself had accepted the recommendations of the AA report without qualification. The plaintiff was estopped from denying that he was bound by what he himself had agreed to. *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* (foll). (paras 23 & 24)

(5) The plaintiff was not entitled to rely on s. 44 of the Partnership Act 1961 to say that he was entitled to such share of the profits made since the dissolution of the partnership on 31 December 1988, as may be attributable to use of his share of the partnership assets. It was clear from the words, "in the absence of any agreement to the contrary", in s. 44, that the right of an outgoing partner to post dissolution profits or interest may be excluded by the terms of the agreement between all the partners. The plaintiff had agreed to and was bound by the recommendations in the AA Report. (paras 27-30)

(6) Upon retirement from a partnership, a partner's entire share in the firm must be dealt with, irrespective of whether it is an "absolute share" or not, in the absence of any unequivocal agreement to the contrary which is not illegal or against public policy. Therefore, the 5% "absolute share" was to be dealt with in accordance with the agreement with respect to retirement, reflected in paragraphs 1.2.9 and 1.2.10 of the AA Report. When the plaintiff retired from the firm on 31 December 1988 he had the option of passing on his 5% "absolute share" to his descendant who was able, willing and ready to take up the said share, or selling the same at the market price. There was no evidence of such descendant to whom he could pass on his "absolute share" so his only other option was to sell the said "absolute share" to the remaining partners of the firm as at 31 December 1988. At the time of the plaintiff's retirement, the partnership had a negative goodwill of RM1,135,057. The plaintiff's 5% "absolute share" on 31 December 1988 was

A therefore "worthless". The learned trial judge erred in allowing the claim for the 5% "absolute share" and further fell into serious error when he directed the parties to appoint an accountant to assess the value of the 5% "absolute share" for one year ending 31 December 1989. The court was unanimous
B that the 5% "absolute share" was to be determined by reference to the firm's goodwill at the time of his retirement (31 December 1988) and not at any earlier or later date. (paras 31-36

C ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu ('plaintif') dan ketiga-tiga responden-responden ('defendan-defendan') adalah pekongsi-pekongsi Tetuan Zain & Co ('firma') dari 1 Januari 1980 hingga persaraan plaintif pada 31 Disember 1988. Juruaudit-juruaudit firma di antara 1983 dan 1985 adalah
D Tetuan Azman Wong Salleh & Co ('AWS'). Mereka menilai firma pada 1 Januari 1980 sebanyak RM1,500,000 dan laporan mereka bertarikh 18 November 1985 ('Laporan AWS') menggunakan kaedah "untung-lebihan" untuk penilaian yang merupakan kaedah penilaian yang diterima oleh amalan profesional. Penilaian firma sebanyak
E RM1,500,000 telah diterima oleh plaintif dan defendan-defendan. Sebelum penerimaan defendan-defendan kedua dan ketiga sebagai pekongsi-pekongsi, plaintif dan defendan pertama memegang 40% and 60% ekuiti firma masing-masing. Selepas penerimaan defendan kedua dan ketiga sebagai pekongsi-pekongsi firma pada 1 Januari
F 1980, plaintif dan defendan pertama melepaskan 6.5% dan 16.5% syer-syer mereka masing-masing. Oleh itu, 23% ekuiti firma telah dilepaskan pada 1 Januari 1980 kepada pekongsi-pekongsi baru – 12% kepada defendan kedua dan 11% kepada defendan ketiga. Plaintif dan defendan pertama berhak menerima RM97,500 dan
G RM247,500 masing-masing iaitu nilai 6.5% dan 16.5% firma yang mereka melepaskan kepada defendan-defendan kedua dan ketiga pada 1 Januari 1980. Pada tahun 1985, firma melantik Arthur Anderson ('AA') sebagai juruaudit-juruaudit baru untuk menyemak semula
H struktur perkongsian firma dan mereka menyediakan suatu laporan bertarikh 3 Oktober 1986 ('Laporan AA'). Pada 22 November 1986, pekongi-pekongsi firma pada masa itu jumpa dan membincangkan tentang Laporan AA. Pekongsi-pekongsi menerima Laporan AA tertakluk kepada reservasi bahawa, jika nilai syer mana-mana
I pekongsi yang bersara pada masa persaraan kurang dari nilainya pada masa pengambilan, defisit tidak perlu dibayar oleh pekongsi yang bersara itu, kalau persaraannya lebih dari dua tahun selepas

penerimaannya ke dalam perkongsian. Firma memberikan plaintif suatu salinan akaun-akaun firma yang diaudit pada 31 Disember 1988 selepas persaraannya. Firma dalam surat penutupnya memberitahu plaintif bahawa amaun yang belum dijelaskan olehnya adalah RM320,096 dan tanya bagaimana beliau akan cuba menjelaskan jumlah ini yang mengikut Laporan AA perlu dijelaskan dalam masa satu tahun dari persaraannya. Plaintif tidak mempertikaikan berhutang RM320,096 dan bahawa ia perlu dibayar dalam masa satu tahun dari persaraannya, tetapi menyatakan bahawa beliau percaya nilai syernya dalam firma pada masa persaraannya akan melebihi amaun yang perlu dijelaskan dalam akaun semasanya. Melalui dokumen bertarikh 20 September 1990 AA menentukan bahawa amaun bersih sebanyak 215,521 perlu dijelaskan oleh plaintif kepada firma. Berdasarkan pengiraan AA, nama baik yang perlu dibayar kepada plaintif pada masa persaraannya ialah RM157,302. Plaintif terkilan tentang nilai haknya pada masa persaraannya dan memulakan prosiding terhadap defendan-defendan dalam Mahkamah Tinggi. Hakim Mahkamah Tinggi selepas perbicaraan penuh menolak tuntutan plaintif untuk (i) suatu deklarasi bahawa aset-aset firma berkepunyaan plaintif dan defendan pertama sahaja dan, oleh itu, defendan-defendan kedua dan ketiga bertanggungjawab untuk penggunaan aset-aset firma; (ii) bayaran aset-aset lain; (iii) RM69,309 untuk nama baik asal yang telah didebit dalam akaun plaintif; (iv) baki bayaran nama baik dalam jumlah RM346,799 dan membenarkan tuntutan plaintif untuk bayaran syer mutlak pada 5% untuk jangka masa satu tahun dari tarikh persaraannya berikutan dengan perjanjian di antara pihak-pihak yang apa-apa yang dihutang oleh firma kepada plaintif mesti dibayar dalam masa satu tahun dari persaraannya dan begitu juga apa-apa yang dihutang oleh plaintif kepada firma mesti juga diselesaikan dalam masa satu tahun dari persaraannya. Plaintif, tidak berpuashati dengan dapatan-dapatan tersebut, merayu kepada mahkamah ini dan pokok pertikaian merupakan nilai hak plaintif apabila beliau bersara dari firma pada 31 Disember 1988. Defendan-defendan merayu balas terhadap hakim perbicaraan membenarkan amaun yang dituntut oleh plaintif untuk 5% "syer mutlaknya."

Diputuskan (menolak rayuan plaintif dan membenarkan rayuan balas defendan-defendan)

Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah adalah sebulat suara bahawa kaedah untung-lebihan pengiraan ialah kaedah paling bagus dalam menilaikan suatu perniagaan dalam bentuk amalan undang-undang. Dalam kaedah

pengiraan ini, nama baik tidak dianggap sebegai aset spesifik di dalam kunci kira-kira firma. Nama baik merujuk kepada nilai seluruh firma dan semua aset-aset firma diambil kira dalam kaedah pengiraan nama baik "untung-lebihan".

(2) Mahkamah adalah sebulat suara bahawa tuntutan plaintif untuk baki bayaran nama baik berjumlah kepada RM346,799 tidak mempunyai apa-apa merit. Berdasarkan kaedah "untung-lebihan", perkongsian mempunyai nama baik negatif sebanyak RM1,135,057. Jumlah sebanyak RM157,302 perlu dibayar oleh firma kepada plaintif berhubung dengan amaun bersih nama baik yang dibeli dan dijual oleh plaintif. RM372,823 perlu dibayar oleh plaintif kepada firma berkenaan dengan akaun semasanya. Oleh yang demikian, pada masa persaraannya plaintif berhutang kepada firma dalam jumlah sebanyak RM215,521. Ini adalah dapatan tulen fakta dan aritmetik.

(3) Yang arif hakim perbicaraan betul bila menolak tuntutan plaintif bahawa aset-aset firma berkepunyaan plaintif dan defendan pertama secara eksklusif. Terdapat keterangan mencukupi di hadapan hakim perbicaraan untuk mencapai dapatan sebegitu, dan ia tidak perlu diusik secara rayuan. Dari keadaan kes ini, ia tidak boleh dipertikaikan bahawa aset-aset firma berkepunyaan kesemua pekongsi-pekongsi firma. Oleh itu, tuntutan plaintif berhubung dengan pengunaan berterusan oleh defendan-defendan nilai nama baik firma plaintif dan nilai plaintif aset-aset firma tidak mempunyai merit.

(4) Kedudukan keseluruhan seorang pekongsi pada masa persaraannya telah diliputi oleh Laporan AA. Plaintif sendirinya telah menerima syor-syor laporan AA tanpa syarat. Plaintif diestop dari menafikan bahawa beliau diikat oleh apa yang disetujui oleh beliau sendiri. *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* (diikuti).

(5) Plaintif tidak berhak bergantung kepada s. 44 Akta Perkongsian 1961 untuk mengatakan bahawa beliau berhak mendapat syer sebegitu keuntungan semenjak pembubaran perkongsian pada 31 Disember 1988, seperti yang boleh berpunca kepada penggunaan syernya aset-aset perkongsian. Ia adalah jelas daripada perkataan-perkataan, "dalam ketiadaan perjanjian yang bertentangan" di dalam s. 44, bahawa hak seseorang pekongsi yang bakal bersara untuk meletakkan keuntungan-keuntungan atau bunga

pembubaran boleh dikecualikan oleh terma-terma perjanjian di antara semua pihak-pihak. Plaintif telah bersetuju kepada dan telah diikat oleh syor-syor Laporan AA.

(6) Selepas persaraan dari perkongsian, keseluruhan syer seseorang pekongsi dalam firma mesti diselesaikan, tidak kira sama ada ia merupakan "syer mutlak" atau tidak, dalam ketiadaan apa-apa perjanjian nyata yang bertentangan yang tidak menyalahi undang-undang atau polisi awam. Oleh yang demikian, 5% "syer mutlak" mesti diselesaikan mengikut perjanjian berkaitan dengan persaraan, seperti yang dicerminkan di dalam perenggan-perenggan 1.2.9 dan 1.2.10 Laporan AA. Apabila plaintif bersara dari firma pada 31 Disember 1988 beliau mempunyai opsyen meninggalkan 5% syer mutlaknya kepada keturunannya yang boleh dan sedia mengambil syer tersebut, atau menjual yang sama pada harga pasaran. Tidak ada apa-apa keterangan tentang keturunan sedemikian yang beliau boleh meninggalkan "syer mutlaknya" oleh itu opsyen beliau ialah hanya untuk menjual "syer mutlak" tersebut kepada pekongsi-pekongsi firma pada 31 Disember 1988. Pada masa plaintif bersara, perkongsian itu mempunyai nama baik negatif sebanyak RM1,135,057. 5% "syer mutlak" plaintiff pada 31 Disember 1988 adalah, oleh yang demikian, "tidak berharga langsung". Yang arif hakim perbicaraan telah khilaf apabila membenarkan tuntutan untuk 5% "syer mutlak" dan khilaf lagi apabila beliau mengarahkan pihak-pihak untuk melantik akauntan untuk mentaksir nilai 5% "syer mutlak" untuk satu tahun kesudahan 31 Disember 1989. Mahkamah sebulat suara bahawa 5% "syer mutlak" seharusnya ditentukan dengan rujukan kepada nama baik firma pada masa persaraannya (31 Disember 1988) dan bukan pada tarikh lebih awal atau lewat.

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(foll)***

Legislation referred to:

Partnership Act 1961, s. 44

For the appellant - N Chandran (S Jeya Palan, Rajan A Applasamy with him); M/s Maxwell Kenion, Cowdy & Jones

For the respondents - Porres P Royan (T Sudhar, WT Low with him); M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Suit No: D3-22-18-1995]

Reported by Susheila Sreedharan

JUDGMENT

KN Segara JCA:

[1] Messrs Zain & Co (the firm) is a firm of advocates and solicitors in Kuala Lumpur. The appellant (the plaintiff) and the three respondents (the defendants were partners of the firm from 1 January 1980 until the plaintiff's retirement on 31 December 1988.

[2] The firm was established on 1 November 1970. The 1st defendant and the plaintiff together with one Lai Kee Chong (Lai) were the founding partners of the firm with the 1st defendant holding a 70% equity, whilst the plaintiff and Lai each held 15% equity in the firm. It was agreed that the retirement or death of any partner shall not have the effect of dissolving the partnership and none of the partners shall have the right at any time for any cause whatsoever to determine the partnership. Lai retired from the firm on 30 November 1976.

[3] The 2nd and 3rd defendants were admitted as partners of the firm on 1 January 1980. They were informed, when invited to become partners in late 1979 by the 1st defendant, that their respective shares in the firm would be 12% and 11% and that their respective shares would be valued. They would not have to pay immediately for their respective shares but the values would be debited to their respective capital accounts. The 1st defendant testified:

> The 2nd & 3rd defendants were made partners of the firm w.e.f. 1/1/80. I invited them to join in as partners in 1979 towards the end. Before doing this I had discussed with the plaintiff – the proposal to offer the partnership to 2nd & 3rd defendants. It was only after discussion with him and he agreed that I offered the partnership to 2nd & 3rd defendants. Before 2nd and 3rd defendants joined in the plaintiff and I were equity partners. When I made the offer to 2nd & 3rd defendants, after a discussion with plaintiff, I offered 12% of shares to 2nd defendant and 11% to 3rd defendant. When I discussed the proposal with the plaintiff the plaintiff did not object to the offer of partnership and to the percentages.
>
> The offer made to the 2nd and 3rd defendants was a share in the partnership and not only in the goodwill. This was what was agreed upon between me and the plaintiff. I am amazed why the plaintiff claims that the partnership offered was only in respect of goodwill only.

[4] The firm's auditors between 1983 and 1985 were M/s Azman Wong Salleh & Co (AWS). The auditors valued the firm as at 1 January 1980 at RM1,500,000 and the report is dated 18 November 1985 (AWS Report). The auditors used the "the surplus-profit" method for valuation of the firm – an accepted method of valuation of a professional practice. The valuation of the firm at RM1,500,000 was accepted by the plaintiff and the defendants.

[5] Immediately prior to the admission of the 2nd and 3rd defendants as partners, the plaintiff held 40% equity and 1st defendant 60% equity of the firm. Therefore, the value of their respective shares as at 1 January 1980 was RM600,000 and RM900,000. It is common knowledge and beyond dispute that the respective values of the shares of the partners from year to year are liable to fluctuate depending on the performance of the firm.

[6] Upon admission of the 2nd & 3rd defendants as partners of the firm on 1 January 1980, the plaintiff and the 1st defendant divested 6.5% and 16.5% of their shares, respectively. Thus, 23% equity of the firm was divested on 1 January 1980 to the new partners – 12% to the 2nd defendant and 11% to the 3rd defendant. Thus, the plaintiff was entitled to a sum of RM97,500 from this exercise, being the value of 6.5% of the firm which he divested to the 2nd and 3rd defendant, and correspondingly, the 1st defendant was entitled to a sum of RM247,500 being the value of 16.5% of the firm which he divested to the 2nd and 3rd defendant as at 1 January 1980.

[7] In 1985, the firm appointed Arthur Anderson as its new auditors and they were instructed to undertake a review of the firm's partnership structure. They produced a report dated 3 October 1986 (AA Report).

[8] On 22 November 1986, the partners of the firm at that material time (including one Mr. Lloyd Fernando) met and discussed the AA Report. The partners accepted the AA report subject to the reservation that, in the event of the value of the share of any retiring partner at the time of retirement was lower than its value at the time of acquisition, the deficit need not be paid by the retiring partner, provided his retirement was after two years of his admission to the partnership.

[9] The plaintiff retired from the firm on 31 December 1988. The firm forwarded him a copy of the audited accounts of the firm as at 31 December 1988. It showed that the plaintiff owed the firm the sum of RM327,096. However, the firm in the covering letter, dated 4 October 1989, forwarding the said audited accounts informed the plaintiff that the outstanding amount presently due from him is RM320,096, after taking into account the sum of RM7,000 deducted from fees paid by Tobishma Corporation. The plaintiff was asked how he proposed to settle the amount of RM320,096 which was then owing by the plaintiff to the firm, and according to the AA Report was to be settled within one year of his retirement. The plaintiff, in his reply dated 8 February 1990, did not dispute that he owed RM320,096 and that it was payable within one year of his retirement, but stated that he believed the value of his share in the firm at the time of his retirement would be in excess of the amount due in his current account. The plaintiff's letter to the firm dated 8 February 1990 reads:

> …
>
> **Re: Zain & Co's Audited Accounts**
>
> **As at 31st December 1988**
>
> I refer to your letter dated 4 October 1989 and thank you for the copy of the audited accounts enclosed therewith. I regret that I was not able to reply to your said letter earlier than this.
>
> You have requested for my proposal for the settlement of the outstanding amount in my current account. But I note you have not mentioned anything regarding the value of my share in the firm at the time of my retirement. I believe the value of my share would be in excess of the amount due in my current account.
>
> I shall therefore be grateful if you would kindly arrange for the value of my said share to be determined as soon as possible.
>
> …
>
> sgd
>
> …
>
> Mohamed Ismail

[10] By a document dated 20 September 1990 AA made a determination of what was due to the plaintiff on his retirement on 31 December 1988. It was AA's determination that a net amount of RM215,521 was due from the plaintiff to the firm. Some extracts from the AA Valuation may give a better understanding of how this amount was determined.

20 September, 1990

Attention: Encik Zain Azahari

Goodwill Computation As At 1 January

At your request, we have computed the goodwill of the partnership as at 1 January, 1989 based on the assumptions and method contained herein. Based on our computation, as at 1 January, 1989, the partnership has a negative goodwill of $1,135,057. This negative goodwill does not imply that the firm of Zain & Co. has no value or negative goodwill. Rather it means that the projected net income of the partnership is less than the partners fair earnings if they are employed elsewhere.

The negative goodwill of $1,135,057 as at 1 January, 1989 is computed as follows;

A. **Definitions**

1.

2.

B. **Assumptions**

1. The basis of valuation of goodwill by Azman Wong Salleh & Co. in their report dated 18 November, 1985 is adopted for the goodwill valuation from 1983 to 1988.

2. The fair earnings of partners are assumed to increase by 5% per annum from 1987 onwards. This is consistent with the assumptions used in computing the goodwill upon the retirement of Mr Llyod Fernando previously.

3. The net income for 1987 and 1988 are based on the audited accounts. The net income after 1988 is assumed to increase by approximately 10% per annum.

C. **Goodwill Computation**

Goodwill as at 31 December, 1988 is computed based on 5 years average "surplus profits/deficits" of the preceding 2 years and succeeding 3 years:

...

...

Total negative goodwill = $(1,135,057)

...

Once this negative goodwill is allocated to the partners according to their respective profit sharing percentage, Encik Mohd Ismail goodwill will also be negative.

As agreed among the partners, on retirement the retiring partner's goodwill should be the higher of his share of the partnership's goodwill at the date of his retirement or the goodwill that he has purchased and paid to the partnership. Since the partnership's goodwill is "negative", we have to determine how much goodwill has Encik Mohd Ismail purchased and paid from the day he entered the partnership until he retires.

Goodwill purchased and paid by Encik Mohd Ismail

The following is an analysis of Encik Mohd. Ismail's purchase and sale of goodwill to date:

	Note	**$**
Goodwill bought from Encik Zain	1	176,968
Goodwill bought from Lai Khee Chong	2	77,834
Goodwill sold to Wilfred Durai and Verghese George	3	(97,500)
		57,302

Note

1. This goodwill amount is as per the valuation done by Azman, Wong, Salleh & Co. as per their report dated 18 November, 1985. This is for his 40% share in the partnership and is reflected in the current account in 1983.

2. This goodwill amount is as per the arbitration in 1979 and was reflected in the partner's current account in the ratio of 50:50. A

3. This was reflected in the partner's current account in 1983.

Based on the above computation, the goodwill payable to Mohd Ismail on the date he retires is $157,302. We also understand that Mohd Ismail also owes money to the partnership. His debt to the partnership can be partially offset by the goodwill payable to him to arrive at the net collectible amount from him. (See ... analysis). B

Amount due from Mohd. Ismail C

The following is an analysis on the amount due from Mohd Ismail as at 31 December, 1988 after taking into account his goodwill:

Balance as per his debtors account	$307,796
Balance as per his capital account	61,684 D
Balance due from Emai Sdn. Bhd.	3,343
Sub-total	$372,823
Less goodwill payable to him	(157,302) E
Amount due from Mohd Ismail	$215,521

F

The above analysis does not include the partnership's car which we understand is taken by Mohd Ismail since we do not have the market value made available to us. If the market value of the car is included, the amount due from Mohd Ismail will be higher.

[11] The plaintiff was aggrieved about the value of his entitlement on his retirement from the firm. On 30 December 1993 the plaintiff commenced proceedings against the defendants in the High Court. G

[12] Although no written judgment of the learned High Court judge is available there is no dispute that after a full trial the learned judge made the following findings on 10 December 2004: H

Goodwill computation of firm by AA through report dated 20/9/1990 (2nd report by AA) AB2 550 was based on surplus-profit method took into consideration of all the assets of the firm. Goodwill valuation computation is such that the value of the whole firm was taken into account. This is clear from SD5's evidence. I

The contention of the Plaintiff that the report did not take into consideration assets of the firm is devoid of any merit and as such rejected. For this reason I rule that the Plaintiff is not entitled to a declaration that assets of the firm belongs to the Plaintiff and 1st Defendant only and as such the 2nd and 3rd Defendants are liable for the use of assets of the firm. This contention is rejected and the claim is dismissed in respect of this contention.

The Plaintiff's claim for payment of other assets is also dismissed. The Plaintiff also claimed that the sum of RM69,309.00 for initial goodwill which was debited in the Plaintiff's account was wrongly done. This is against the evidence by the accountant. I therefore find that on evidence this was not wrongly debited and as such question of reversing the debit does not arise. This claim is also dismissed.

As regards Plaintiff's claim for payment of absolute share at 5% I am of the view this claim should be allowed. However the Plaintiff is not entitled for the payment forever as he has retired from the firm. I am of the opinion that a reasonable period for the Plaintiff to be paid is one year from the date of his retirement in line with the agreement between the parties that whatever that is owed by the firm to the Plaintiff must be paid within one year from his retirement and likewise it was also the arrangement between parties that whatever the Plaintiff owes to the firm must also be settled within one year from his retirement. An account of this entitlement of 5% absolute share must be prepared by an accountant acceptable by both parties. With consent of both parties, the parties are to appoint an accountant to assess the value of the 5% absolute share for 1 year ending 31/12/89 or alternatively, the absolute share is to be sold back to the existing partners as first choice. The firm must pay interest of 8% per annum on this value commencing 1/1/89 to date of full settlement.

The Plaintiff's claim for balance of payment of goodwill in the sum of RM346,799.00 is disallowed.

Counter-claim

Counter-claim is only allowed for RM62,000/= for the price of the car with interest of 8% per annum from 1/1/89 until full settlement of RM62,000/= by the Plaintiff or until surrender of the car to the Defendants.

Costs

No order as to costs.

[13] The plaintiff is dissatisfied with the findings of the learned trial judge. The plaintiff's appeal before us concerns the entitlements of the plaintiff upon his retirement on 31 December 1988 – the crux of the dispute is the value of the plaintiff's entitlement when he retired from the firm on 31 December 1988. The defendants' cross-appeal is against the trial judge allowing the amount claimed by the plaintiff for his 5% "absolute share."

[14] The plaintiff's contention is that when he retired from the firm as a partner on 31 December 1988 he was entitled to his share of the value of the firm then, which, according to him comprises both a) goodwill and b) other assets of the firm, that is:

(i) the capital of the firm;

(ii) the fixed deposits of the firm;

(iii) monies due in respect of work done by the firm but not as yet billed;

(iv) unpaid bills in respect of work done;

(v) value of work in progress;

(vi) all monies advanced by the firm, including by way of disbursements advanced by the firm to clients and all monies owed to the firm.

[15] The defendants contend that there was an agreement among the partners that a retiring partner of the firm would be entitled to his share of the goodwill valued in accordance with the "surplus-profit" method of computation carried out by the accountants of the firm.

[16] Having carefully perused the record of appeal and the testimony of the accountants in the trial court, in particular, the testimony and reports of Abdul Wahab bin Jaffar (SD4) and Abdul Samad bin Hj Alias (SD5), we are unanimous that the "surplus-profit" method of computation is the best method in valuing a business in the nature of a legal practice. Obviously, in this method of computation "goodwill" is not treated as a specific asset in the balance sheet of the firm. It is the failure of the plaintiff to appreciate this, and his delusion that only he and the 1st defendant

(to the exclusion of all other partners) are entitled to the assets of the firm, that has led to the controversy on the value of his entitlement on his date of retirement.

[17] "Goodwill" calculated according to the "surplus-profits" method refers to the value of the entire firm (that is the legal practice). All assets of the firm were taken into consideration in the "surplus-profit" method of computation of "goodwill" in the AA Report dated 20 September 1990. This is a finding of fact by the trial judge, on the evidence before him, especially the testimony of the accountants SD4 and SD5. We have no reason to disturb this finding of fact.

SD4 testified, *inter alia*:

> Goodwill in the context of a legal firm is valuation of the practice at that point of time. The valuation is based on surplus profit method which is considered as the best method in valuing a business like legal practice. In arriving at the profit the assets of the practice has already been effected or taken into account of the profit of the practice. In the report **I use the term goodwill to denote the value of the practice.** (emphasis added)

SD5 testified, *inter alia*:

> The concept of goodwill is the same concept of the firm based on surplus profit concept. Based on this concept I valued the practice as a going concern which assumes the firm has control over assets and liabilities and arising out of the operation it is generating profit. If this **surplus profit method is used its value include the assets, liabilities and profit in arriving at the value of the firm.**
>
> In **accounting practice** the acceptable meaning of **goodwill** – carries **two meanings, one the entire valuation of the practice** and **two** is goodwill as **a specific asset in the balance sheet** of the entity. **In this case the understanding is** that if this method is used **it refers to the entire valuation of the practice.** (emphasis added)

[18] After the plaintiff's retirement on 31 December 1988 the firm arranged with SD5 to ascertain what was due to, and, due from the plaintiff, on his retirement. In the AA Report dated 20 September 1990, SD5 found that based on the "surplus profit" method the partnership had a negative goodwill of RM1,135,057. SD5 ascertained

that there was an amount of RM157,302 due from the firm to the plaintiff in respect of the net amount of goodwill purchased and sold by the plaintiff. SD5 also ascertained that there was a sum of RM372,823 due from the plaintiff to the firm in respect of his current account. Therefore, on his retirement the plaintiff was indebted to the firm in the sum of RM215,521. This is a pure finding of fact and arithmetic. We are, therefore, unanimous that the plaintiff's claim for balance of payment of goodwill in the sum of RM346,799, which was disallowed by the trial judge, is devoid of any merit.

[19] The issue as to whether the assets of the firm belonged only to the plaintiff and the 1st defendant is a finding of fact and the learned trial judge rejected the plaintiff's claim that the assets of the firm belonged to the plaintiff and 1st defendant exclusively. Upon a careful perusal of the record of appeal, we are unanimous that there was more than sufficient evidence before the trial judge to arrive at such a finding, and it does not warrant any appellate interference.

[20] The plaintiff's assertion that there were two types of shares in the partnership and that the 2nd and 3rd defendants had only purchased the goodwill and not the other assets of the firm is not sustainable, on the evidence before the court.

[21] The plaintiff admitted that at the time the 2nd and 3rd defendants were made partners, the full terms of the partnership were not set out and agreed. The plaintiff also testified, that at the time the decision to admit the 2nd and 3rd defendants as new partners was made, he did not inform them that their partnership was only profit sharing in nature. The plaintiff did not tell the 2nd and 3rd defendants that they were entitled to the goodwill only but not the assets of the firm.

[22] The 2nd and 3rd defendants were liable for the overdrafts taken by the firm prior to their joining the firm and, for purchases made by the firm after they joined the firm. There is also the unchallenged and unequivocal evidence of the 1st defendant that the offer made to the 2nd and 3rd defendants was for a share in the partnership and not for a share in the goodwill only. Furthermore, AWS was never instructed at any time to take into account the alleged two types of shares in the preparation of the AWS Report, referred to earlier. In the above circumstances, it is indisputable that

A the assets of the firm belonged to all the partners of the firm. Naturally, therefore, the plaintiff's claim in respect of the alleged continued use by the defendants of the plaintiff's value of the goodwill of the firm and the plaintiff's value of the assets of the firm is without any merits.

B

[23] We are of the view the entire position of a partner on his retirement is covered by the AA Report. The plaintiff himself had accepted the recommendations of the AA report without qualification, as evidenced by his own letter, dated 7 October 1986, C which reads:

> My dear En Zain,
>
> I thank you for your letter dated 3 October 1986 together with a copy of the Report by Arthur Andersen & Co.
>
> D I am glad to inform you that I accept the recommendations made therein and agree that the same be implemented upon the Report being accepted by all the other Partners.
>
> With best regards,
>
> E Yours sincerely,
>
> Sd
> Mohamed Ismail.

F **[24]** The plaintiff is estopped from denying that he is bound by what he himself had agreed to. In *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, it was held by the Federal Court, *inter alia*:

> (2) The doctrine of estoppel is a flexible principle by which justice G is done according to circumstances. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. The maxim 'estoppel may be used as a shield but not as a sword' does not limit the doctrine of estoppel to defendants alone. Plaintiffs too may have recourse to it. H Estoppel may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.

[25] All the partners of the firm at the material time had agreed to the AA Report recommendation, which is found in paras 1.2.2, I 1.2.3, 1.2.9, 1.2.10 and 1.2.13, which reads as follows:

1.2.2 Mr. Llyod Fernando's capital account to be debited by $193,410 (refer to Appendix C.1) as his share of goodwill purchased on his admission in the Firm as partner on January 1, 1983. Tuan Haji Sulaiman and Mr. Sunder Ethi Rajah's capital accounts to be debited by $48,108 (refer to Appendix C.2) respectively as their share of goodwill purchased on their admission in the Firm as partners on January 1, 1986. The other partners' accounts to be credited as shown in Appendix C as their share of the goodwill sold on the admission of new partners to the Firm. The computation of goodwill valuation is shown in Appendix C and is consistent with the method adopted by Azman, Wong, Salleh & Co in their report dated November 18, 1985 in the valuation of goodwill on the admission of Mr. Wilfred Durai and Mr. Varghese George in the Firm as partners on January 1, 1980. The effect of implementing this is shown in section 1.2.14 for illustrative purposes.

1.2.3 The goodwill purchased is to be debited to the respective partners' capital account and the corresponding goodwill sold is to be credited to the respective partner's current account.

1.2.9 Upon retirement of a partner the credit balance on the partner's current account is to be reimbursed to him over a maximum period of 6 months from the date of the retirement unless specifically agreed by him. There is to be a valuation of goodwill on the retirement of a partner. The balance on the partner's capital account together of his share of the goodwill is to be paid to him at the higher of 5% of the annual profits of the Firm attributable to the partners or $60,000 per annum until the amount is fully paid. All amounts owing by the partners to the Firm on retirement should be repaid within 1 year from the date of retirement unless specifically otherwise agreed by the remaining partners.

1.2.10 The 40% and 5% absolute profit sharing percentage held by En Zain Azahari and Encik Mohamed Ismail respectively can be passed to their descendants or sold off at the market price at their discretion. If sale is contemplated, the partners in the Firm is to have the first right of offer at the market price.

These absolute profit sharing percentages do not qualify for a share of the goodwill sold on the admission of new partners under the points profit sharing scheme.

A 1.2.13 Our recommendation should take effect for year ending December 31, 1986 except Section 1.2.3 which is to have retrospective effect from January 1, 1980.

[26] We are of the view, that upon a careful consideration of all the evidence (oral and documentary) the partners of the firm, including the plaintiff and the defendants, had agreed that a retiring partner would be entitled to:

(a) payment of his share of the goodwill plus the balance on his capital account at the higher of 5% of the annual profits of the Firm attributable to the partners or RM60,000 per annum until the amount is fully paid;

(b) reimbursement of the credit balance on his current account over a maximum period of six months from the date of his retirement unless specifically otherwise agreed by him but all amounts owing by him to the firm should be repaid within one year from the date of his retirement unless specifically otherwise agreed by the remaining partners;

(c) if the value of the share of the retiring partner at the time of retirement is lower than its value at the time of acquisition (that is, on the date of his admission to the partnership) the deficit need not be paid by the retiring partner provided his retirement was after two years of his admission to the partnership.

[27] On the factual matrix of this case, it is clear that the plaintiff is not entitled to rely on s. 44 of the Partnership Act 1961 to say that he is entitled to such share of the profits made since the dissolution of the partnership on 31 December 1988, as may be attributable to use of his share of the partnership assets.

[28] It is clear from the words, "in the absence of any agreement to the contrary", in s. 44 of the Partnership Act 1961, that the right of an outgoing partner to post dissolution profits or interest may be excluded by the terms of the agreement between all the partners.

[29] The plaintiff had agreed to and was bound by the recommendations in the AA Report. The said AA Report deals specifically with the retirement of a partner and the effect thereof under paras 1.2.9 and 1.2.10. Upon retirement, the following will have to take place:

(i) the credit balance on the partner's current account is to be reimbursed to him over a maximum period of six months from the date of retirement unless specifically agreed by him;

(ii) there is to be a valuation of goodwill;

(iii) the balance on the partner's capital account together with his share of the goodwill is to be paid to him at the higher of 5% of the annual profits of the firm attributable to the partners or RM60,000 per annum until the amount is fully paid;

(iv) all amounts owing by the partner to the firm on retirement should be repaid within one year from the date of retirement unless specifically otherwise agreed by the remaining partners;

[30] As paras 1.2.9 and 1.2.10 of the AA Report deal with the entire position of the plaintiff upon his retirement from the firm, the said paragraphs are the "agreement to the contrary" postulated in s. 44 of the Partnership Act 1961 which excludes the right of the plaintiff to post dissolution profits or interest. Furthermore, the said s. 44 can come into operation only if there has been no final settlement of accounts as between the firm and the plaintiff (the outgoing partner). There is uncontroverted evidence that there has been a final settlement of accounts between the firm and the plaintiff, as the audited accounts of the firm as at 31 December 1988 was forwarded to the plaintiff *vide* letter dated 4 October 1989. A *fortiori*, the plaintiff has not instituted any proceedings against the firm or the defendants for the taking of accounts (as at 31 December 1988). For ease of comprehension, s. 44 of the Partnership Act 1961 is reproduced:

> **44. Rights of outgoing partner in certain cases to share profits made after dissolution.**
>
> Where **any member of a firm has** died or otherwise **ceased to be a partner,** and the surviving or **continuing partners carry on business** of the firm with its capital or assets **without any final settlement of accounts as between the firm and the outgoing partner** or his estate, **then,** in the **absence of any agreement** to the contrary, **the outgoing partner** or his estate **is entitled,** at the option of himself or his representatives, **to such shares of the profits made since the dissolution** as the court may find to be **attributable to the use of his share of the partnership assets,** or to interest at the rate of eight per cent per annum on the amount of his share of the partnership assets;

A Provided that where, by the partnership contract, an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and the option is duly exercised, the estate of the deceased partner or the outgoing partner or his estate as the case may be, is not entitled to any further or other share of
B profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the preceding provisions of this section. (emphasis added)

[31] The defendants have cross-appealed on the plaintiff's claim for
C payment of "absolute share" at 5% which was allowed by the trial judge.

[32] There is no dispute that both the plaintiff and the 1st defendant, as the founding partners of the firm, held what was
D agreed by them as "absolute shares" in the proportion of 5% and 40%, respectively. Nevertheless, we are of the view that the learned trial judge has seriously misdirected himself in allowing the claim of 5% "absolute share" by the plaintiff.

[33] It is trite, that upon retirement from a partnership, a partner's
E entire share in the firm must be dealt with, irrespective of whether it is an "absolute share" or not, in the absence of any unequivocal agreement to the contrary which is not illegal or against public policy. Therefore, the 5% "absolute share" was to be dealt with in accordance with the agreement with respect to retirement, reflected
F in paras 1.2.9 and 1.2.10 of the AA Report.

[34] Upon a proper construction of paras 1.2.9 and 1.2.10 of the AA Report it would appear that when the plaintiff retired from the firm (on 31 December 1988) he had the option of passing on his
G 5% "absolute share" to his descendant who was able willing and ready to take up the said share or selling the same at the market price. In order to pass on his "absolute share", there is an implied pre-requisite that the said descendant must be an advocate and solicitor, because a person who is not an advocate and solicitor
H (within the meaning of the Legal Profession Act 1976) cannot be a partner in a legal firm. It would appear that when the plaintiff retired from the firm he had no evidence of such descendant to whom he could pass on his "absolute share". The only other option open to the plaintiff was to sell the said "absolute share" to the
I remaining partners of the firm as at 31 December 1988.

[35] SD5's report dated 20 September 1990, concluded, *inter alia*, that at the time of the plaintiff's retirement on 31 December 1988, the partnership had a negative goodwill of RM1,135,057. Therefore, the plaintiff's 5% "absolute share" on 31 December 1988 was "worthless". Consequently, the plaintiff's entitlement under the said shares is nil. The learned trial judge has, therefore, erred in allowing the claim for the 5% "absolute share." He further fell into serious error when he directed the parties to appoint an accountant to assess the value of the 5% "absolute share" for one year ending 31 December 1989. We are unanimous that the 5% "absolute share" is to be determined by reference to the firm's goodwill at the time of his retirement (31 December 1988) and not at any earlier or later date.

[36] In the above circumstances, we dismissed the plaintiff's appeal with costs and allowed defendants' the cross- appeal, with no order as to costs. The deposit is to be paid out to the defendants to account of taxed costs.